APPEAL NO. 93099
MARCH 25, 1993

On December 7, 1992, a contested case hearing was held. The hearing was held pursuant to the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). The issue at the hearing was whether the respondent (claimant herein) reached maximum medical improvement (MMI) on June 11, 1992 based on the report of Dr. F. The hearing officer determined that Dr. F was not a designated doctor under Articles 8308-4.25 or 8308-4.26 and that his report is not entitled to presumptive weight. The hearing officer further determined that the claimant had not reached MMI on June 11, 1992. The appellant (carrier herein) requests that we reverse the hearing officer's decision and render a decision that Dr. F was a designated doctor, that his report is entitled to presumptive weight, and that the claimant reached MMI on June 11, 1992. In the alternative, the carrier requests that if we determine that Dr. F was not a designated doctor, that we also determine that Dr. D was not a designated doctor and that we remand the case to seek clarification from the claimant's treating doctor, Dr. A, as to what date MMI was reached. The carrier alternately requests that we remand the case for appointment of a "final" designated doctor to determine MMI and impairment rating. No response to the carrier's request for review was filed.

DECISION

The decision of the hearing officer is modified and as modified is affirmed.

The claimant is a carpenter. On _____ the claimant injured his back while hanging doors for his employer, _____. Although not reflected in the hearing officer's decision, the parties stipulated that the carrier accepted liability for the claimant's injury. Dr. A, M.D., the claimant's treating doctor, performed surgery on the claimant's back in September 1991. The claimant said that after the surgery was performed, Dr. A sent him to Dr. T, M.D., for a procedure to clean out scar tissue that is obstructing nerves in his back but the procedure was not performed because the carrier refused to authorize it. The claimant said that Dr. A reported in April 1992 that the claimant had reached MMI with a 12 percent impairment rating. He said the carrier disagreed with the impairment rating on the basis that some of his impairment was due to prior surgery. The hearing officer took official notice of a Notice of Refused or Disputed Claim dated April 23, 1992 which stated "[c]arrier agrees to pay 5% impairment at this time. Carrier has requested clarification from doctor on 12% rating for contribution on prior surgery 12 years (sic) its choice for impairment rating."

The claimant said his wife talked to CA, a Commission disability determination officer (the DDO), who sent him to Dr. F, M.D., in June 1992. He said he didn't have any discussions with the carrier's claims adjustor, BL, before seeing Dr. F. The claimant said that Dr. F saw him for about five minutes and told him that he did not have any of the claimant's medical records. He said that Dr. F talked to him, took a little hammer and hit him on the legs, asked him to lift his legs, asked him to stand on his toes, and asked him

to move forward, backward, and to the side. He did not recall Dr. F taking any "measurements." In a letter to the carrier dated June 11, 1992, Dr. F stated that the claimant had probably reached MMI, and gave a "net impairment" of five percent due to the surgery of September 1991. The claimant said that he disagrees with Dr. F's report of June 11, 1992.

The claimant testified that he was aggravated with Dr. F and that after seeing him he called the DDO who, he said, told him that she would set up an appointment for him with Dr. D, M.D., and also told him "you got to go with whatever he says, good or bad, you know because he is going to be the doctor that is going to determine, you know, if you're going to get anything, or you're going to get nothing." The claimant said he told the DDO "that is good enough" and "we'll go with that." The claimant testified that "they" never told him anything like that when he saw Dr. F. The claimant further testified that he saw Dr. D in July 1992, that he didn't think that Dr. D had any of his medical records but that Dr. D's secretary called Dr. A for the records, and that Dr. D discussed his history and September 1991 operation with him and took x-rays. In a letter dated July 22, 1992, Dr. D said that he felt that the claimant has not reached MMI and that he has about 12 percent "permanent impairment of function according to the tables of the AMA."

The claimant's wife testified that when Dr. A gave the claimant a 12 percent impairment rating the claimant received a notice from the carrier which said that the carrier disagreed with that rating and was going to pay benefits based on a five percent impairment rating. She said she called the DDO and told her that the claimant disagreed with the carrier's impairment rating, that the DDO said that she would send the claimant to a doctor "to determine the percentage rating--the impairment rating--total body impairment," and that the claimant then received a letter from the Commission which said that the Commission was going to send the claimant to Dr. F to "clarify on the percentage of the impairment rating." This witness identified Carrier's Exhibits No. 1 and No. 3 as the documents she received from the Commission concerning Dr. F. Carrier's Exhibit No. 1 is a Request for Medical Examination Order (TWCC-22) which indicates that the request was made by the Commission, that the health care provider is Dr. F, that the appointment date is June 11, 1992, that the purpose of the examination is "to determine a total body impairment rating and the date MMI was or will be reached." The Commission order which is part of the document is dated April 29, 1992, is signed by the DDO, and orders the claimant to attend an examination by Dr. F. The document contains the following preprinted language: "This request must comply with Art. 8308-4.16., Rule 126.5." Carrier's Exhibit No. 3 is a letter from the DDO to the carrier's claims adjustor dated April 29, 1992, which states:

> This letter will serve as receipt of dispute over the impairment rating assigned. According to TWCC law a designated doctor has been assigned to examine the above mentioned claimant. Please note, it is the responsibility of the carrier to ensure all medical reports, test results and x-

rays reach the designated doctor prior to the date of the exam.

The letter does not mention who the designated doctor is nor the date of the examination. The letter does not indicate that a copy of it was sent to Dr. F (Dr. F's name does not appear anywhere on the letter). The letter does identify the claimant as the employee and the date of accident as _____. The claimant's wife could not recall which of the two documents she received first.

The claimant's wife said that neither the DDO nor the Commission letter informed them that Dr. F was a designated doctor. The claimant's wife further stated that "we weren't aware of our rights," and that "we didn't ever know that we could disagree or agree. We were never told." She testified that it was her understanding that the claimant was sent to Dr. F because there was a dispute over Dr. A's 12 percent impairment rating. She said that she and the claimant went to Dr. F and that Dr. F told them that he did not have any of the claimant's medical records. She said she and the claimant were upset when they received Dr. F's report so she called the DDO who, she said, told her that if the claimant disagreed with Dr. F's report that he could ask for a designated doctor. She further stated that when she told the DDO "that is what he [the claimant] wanted to do because we did not agree with his [Dr. F's] report at all," the DDO told her that she would make an appointment with a designated doctor and that whatever he decided the claimant would have to live with. This witness said that the claimant then received a letter from the Commission which clarified that Dr. D would be the designated doctor. This witness identified Carrier's Exhibit No. 6 as the letter she received from the Commission concerning Dr. D. Carrier's Exhibit No. 6 is a letter dated July 9, 1992 from the DDO and is addressed to both the carrier and the claimant. It indicates that a copy of the letter was sent to Dr. D and states as follows:

> The above mentioned claimant has been assigned a Designated Doctor due to the dispute over the impairment rating(s). Please note, it is the responsibility of the carrier to ensure all medical reports, test results and x-rays reach the designated doctors (sic) office prior to the date of the exam.

Carrier's Exhibit No. 2 is another TWCC-22 which indicates that the request for medical examination order was made by the Commission, that the health care provider is Dr. D, that the appointment date is July 20, 1992, and that the purpose of the examination is "To assess a total body impairment." The Commission order signed by the DDO which is part of the TWCC-22 is dated July 9, 1992 and orders the claimant to attend an examination by Dr. D. This document also contains the preprinted language "[t]his request must comply with Art. 8308-4.16., Rule 126.5."

The claimant's wife also said that she and the claimant believe that Dr. D is the designated doctor because that is what they were told, that Dr. F is not a designated doctor because they were never told that he was a designated doctor, and that the claimant has not reached MMI. She also stated that Dr. A had admitted that he made a

mistake when he reported that the claimant had reached MMI in April 1992.

Reports from Dr. A, the claimant's treating doctor, stated that the claimant had a lumbar laminectomy at L5-S1 either on September 17 or 18, 1991, that the claimant attended physical therapy sessions after his surgery, and that the claimant reached MMI on April 7, 1992 with a 12 percent whole body impairment rating. The certification of MMI and impairment rating were reported on a Report of Medical Evaluation (TWCC-69) which contains a date stamp showing it was received by "CLA HOU" on April 20, 1992. However, in a Specific and Subsequent Medical Report (TWCC-64) dated July 15, 1992, Dr. A indicated that he anticipated that the claimant would not reach MMI until October 15, 1992, and in another TWCC-64 dated October 29, 1992, Dr. A indicated that he anticipated that the claimant would not reach MMI until January 20, 1993. The latter report also shows a referral to Dr. T.

There was no TWCC-69 from Dr. F in evidence. In a June 11, 1992 letter to the carrier's claims adjustor, Dr. F, M.D., said that the claimant was seen in his office on June 11th and that some records were provided for his review. However, he said that he did not have records concerning the claimant's back surgery of 12 years ago nor did he have the "operative note" for the claimant's surgery of September 1991. He said that electrodiagnostic studies of January 1992 showed persistent abnormalities of L5 on the right, but that according to reports of Dr. A, postoperative testings do not show recurrent pathology. Dr. F set out his findings on examination of the claimant and stated that:

> In my opinion, the patient has probably reached maximal (sic) medical improvement referable to his back surgery of 9/18/91. I do not have the operative note in order to analyze specifically the disorder. Assuming a one-level laminectomy 12 years ago, an 8% impairment of the whole person would be assessed to that procedure. Assuming at least a two-level laminectomy of September, 1991, I assess a 13% impairment rating utilizing Table 53, II-EG-1, page 80. This would give a net impairment of 5% of the whole person due to the back surgery of 9/18/91, allowing for the offset with the preexisting surgery of 8%, as explained above.

In an undated TWCC-69, Dr. D reported that the claimant had not reached MMI, gave September 17, 1992 as the estimated date of MMI, and stated that the claimant had a 12 percent whole body impairment rating. In a letter dated July 22, 1992, Dr. D reported that the claimant came to his office on July 20, 1992 for an "IME and consultation." Dr. D noted that about 12 years ago the claimant had surgery on his back for a herniated lumbar disc, got well following that surgery, and had no further difficulty until the present injury. The letter sets forth Dr. D's findings on physical examination, results of x-rays, and notes that Dr. A sent him records, including the operative report and an evaluation prior to surgery. Dr. D stated that he felt claimant had not reached MMI and added that "[w]ith the continued symptoms and the two level laminectomy, he has about 12% permanent impairment of function according to the tables of the AMA."

The carrier's position at the hearing was that Dr. F was a designated doctor selected by the Commission, that his report is entitled to presumptive weight and that the claimant reached MMI on June 11, 1992 with a five percent impairment rating. However, the only issue at the hearing, as agreed to by the parties, was whether the claimant reached MMI on June 11, 1992 based on the report of Dr. F.

The hearing officer made the following pertinent findings of fact and conclusions of law:

FINDINGS OF FACT

No. 7. On 20 April 1992 Dr. A filed a TWCC-69 in which he stated that [the claimant] reached MMI on 7 April 1992 and had a 12% whole body impairment rating.

No. 8. On 24 April 1992 carrier filed a TWCC-21, terminated temporary income benefits, and began impairment income benefits. The carrier stated: "Carrier agrees to pay 5% impairment at this time. Carrier has requested clarification from doctor on 12% rating for contribution on prior surgery 12 years (sic) its choice for impairment rating."

No. 9. Only five days later, on April 29, 1992, the Commission, on its own authority, entered a Medical Examination Order to require [the claimant] to be examined by Dr. F on 11 June 1992. The stated purpose of the order was: "to determine a total body impairment rating and the date MMI was or will be reached." The Commission did not notify [the claimant] that the carrier disputed Dr. A's impairment rating or notify [the claimant] that a designated doctor would be directed to examine him to resolve said dispute, before scheduling the 11 June 1992 appointment with Dr. F.

No. 10. The Commission ordered [the claimant] to see Dr. F on 11 June 1992 to determine if the Commission should enter an order permitting the carrier to allocate [the claimant's] impairment between a previous compensable injury, if any, and the current compensable injury.

No. 11. The claimant did not agree to see Dr. F.

No. 12. The Commission did not inform [the claimant] that an

Ombudsman was available to explain the consequences of an agreed designated doctor.

No. 13. On 11 June 1992 Dr. F examined [the claimant] pursuant to the Commission's 29 April 1992 order. On 11 June 1992 Dr. F sent a report to [the carrier] in which he stated that he believed that [the claimant] probably reached MMI, assessed a 13% impairment rating, and allocated 8% of the impairment to a prior back surgery.

No. 14. [The claimant] contacted the Commission after receiving Dr Freeman's report to claim he had not reached MMI and disputed Dr. F's impairment rating.

No. 15. The Commission told [the claimant] that they would appoint a doctor to resolve the dispute. On 9 July 1992 the Commission entered a medical examination order at the Commission's own request directing [the claimant] to be examined by Dr. D on 20 July 1992. The purpose of the examination was "to assess a total body impairment."

No. 16. Dr. D examined [the claimant] on 20 July 1992. Dr. D stated ". . . I feel that he has not reached maximum medical improvement at this time . . . he has about 12% permanent impairment of function according to tables of the AMA." Dr. D filed a TWCC-69 stating that [the claimant] had not reached MMI.

No. 17. Dr. A continues to treat [the claimant] and anticipates that [the claimant] will reach MMI in January 1993.

No. 18. On 11 June 1992 [the claimant] could reasonably be anticipated, based on reasonable medical probability, to have further material recovery from a 16 July 1991 injury.

CONCLUSIONS OF LAW

No. 4. Because: (i) Dr. F was not designated by the Commission, nor agreed to by the parties under Article 8308-4.25 or Article 8308-4.26; (ii) Dr. F was not appointed within the provisions of Rule 130.6; and (iii) Dr. F was appointed by the Commission under the provisions of Article 8308-4.16(a) to determine if an

order to reduce carrier's obligations for impairment income benefits was appropriate under Article 8308-4.30; Dr. F is a Commission ordered doctor under Article 8308-4.16, and Dr. F's report is not entitled to presumptive weight under Article 8308-4.25 or Article 8308-4.26.

No. 5. The claimant did not reach MMI, within the meaning of Article 8308-1.03(32), on 11 June 1992.

The carrier requests our review of the hearing officer's determination that Dr. F was not a designated doctor pursuant to Articles 8308-4.25 or 8308-4.26, and his determination that the claimant did not reach MMI on June 11, 1992.

MMI is defined as the earlier of: (A) the point after which further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated, based on reasonable medical probability; or (B) the expiration of 104 weeks from the date income benefits begin to accrue. Article 8308-1.03(32). Since 104 weeks have not expired from the date income benefits began to accrue for the claimant's _____ injury, the definition of MMI in Article 8308-1.03(32)(A) applies to the facts of this case. Article 8308-4.25 provides that, if a dispute exists as to whether the employee has reached MMI, the Commission shall direct the employee to be examined by a designated doctor selected by mutual agreement of the parties; that if the parties are unable to agree on a designated doctor, the Commission shall direct the employee to be examined by a designated doctor selected by the Commission; that the designated doctor shall report to the Commission; and that the report of the designated doctor shall have presumptive weight and the Commission shall base its determination as to whether the employee has reached MMI on that report unless the great weight of the other medical evidence is to the contrary. Article 8308-4.26(g) provides that, if the impairment rating is disputed, the Commission shall direct the employee to be examined by a designated doctor selected by the mutual agreement of the parties; that if the parties are unable to agree on a designated doctor, the Commission shall direct the employee to be examined by a designated doctor selected by the Commission; that the designated doctor shall report to the Commission in writing; that if the parties agree on a designated doctor, the Commission shall adopt the impairment rating made by the designated doctor; and that if the Commission selects a designated doctor, the report of the designated doctor shall have presumptive weight and the Commission shall base the impairment rating on that report unless the great weight of the other medical evidence is to the contrary, in which case the Commission shall adopt the impairment rating of one of the other doctors.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.6 (Rule 130.6: Designated Doctor: General Provisions) provides in part as follows:

(a) If the Commission receives a notice from the employee or the

insurance carrier that disputes either MMI or an assigned impairment rating, the Commission shall notify the employee and the insurance carrier that a designated doctor will be directed to examine the employee.

(b) After notifying the employee and the insurance carrier, the Commission shall allow the employee and insurance carrier ten days to agree on a designated doctor. The Commission shall inform an unrepresented employee that an Ombudsman is available to explain the contents of the agreement for a designated doctor.

(c) If the employee and the insurance carrier agree on a designated doctor, the carrier shall, within ten days, send a confirmation letter to the employee, with a copy to the Commission. The letter shall include: [contents of letter omitted herein]

(d) The Commission shall contact the worker to confirm the agreement. If the Commission is not notified by the end of the tenth day that an agreement has been reached, the Commission shall issue an order directing the employee to be examined by a designated doctor chosen by the Commission. The examination shall be held within a reasonable time after the order is made. The order shall specify the name, business address, and telephone number of the designated doctor, and the date and time of examination.

* * * *

(g) The designated doctor shall complete and file the medical evaluation report in accordance with Section 130.1 of this title (relating to Reports of Medical Evaluation: MMI and Permanent Impairment).

The critical sequence of events in this case is that on April 23, 1992 the carrier completed a Notice of Refused/Disputed Claim concerning the claimant's impairment rating; that on April 29, 1992 the Commission wrote the carrier a letter (which the claimant also received according to the testimony of the claimant's wife) informing the carrier of receipt of a dispute over impairment rating and that a designated doctor had been assigned to examine the claimant; and that also on April 29, 1992 the Commission at its own request ordered the claimant to see Dr. F to determine impairment rating and MMI. There is no indication in the record that the claimant and the carrier were given any opportunity to mutually agree on a designated doctor as contemplated by Articles 8308-4.25(b) and 8308-4.26(g), or that the Commission allowed the claimant and the carrier 10 days to agree on a designated doctor after notifying the claimant and the carrier that a designated doctor would be directed to examine the claimant. In fact, the evidence

shows that the Commission selected Dr. F to examine the claimant for MMI and impairment rating within only six days of the carrier's notice of disputed claim and on the very same day that it sent the carrier notice of the Commission's receipt of dispute and notice that a designated doctor had been assigned (again, according to the testimony of the claimant's wife, the claimant also received this notice). The claimant's wife testified to the effect that they were not told that they could agree to a designated doctor. In 2 TEX. JUR. 3rd *Administrative Law* § 19 (1979) it is stated that:

> An agency's rules are generally regarded as having the force and effect of law. Consequently, an agency is bound by its own valid and subsisting rules. It is not privileged to violate these rules, nor does its action in violation of a rule confer any vested right upon a party in whose favor it acted. Even if the agency improperly agrees to violate, or acquiesces in the violation of, a rule, the party acquires no rights through such violation.
>
> There is no absolute test by which it may be determined whether an administrative rule or regulation is mandatory or directory. The prime object is to ascertain and give effect to the intent of the rule or regulation. In determining whether the administrative agency intended the provision to be mandatory or directory, consideration should be given to the entire rule, its nature, objects, and the consequences that would result from construing it each way.

Articles 8308-4.25(b) and 8308-4.26(g) specifically require the Commission to direct the employee to be examined by a designated doctor selected by the mutual agreement of the parties. Only in the event that the parties are unable to agree on a designated doctor does the Commission select the designated doctor. Article 8308-2.09(a) provides that the Commission shall adopt rules as necessary for the implementation and enforcement of the 1989 Act. Rule 130.6 implements the designated doctor provisions of Articles 8308-4.25 and 8308-4.26. In particular, Subsection (b) of Rule 130.6 provides that, after notifying the employee and the insurance carrier [that a designated doctor will be directed to examine the employee], the Commission shall allow the employee and the insurance carrier 10 days to agree on a designated doctor. We have previously noted that Rule 130.6 "provides a mechanism for obtaining a designated doctor which includes the receipt by the Commission of a notice of dispute over MMI or the assignment of an impairment rating, and the allowance of 10 days for the employee and insurance carrier to agree on a designated doctor before a selection by the Commission." Texas Workers' Compensation Commission Appeal No. 92233, decided July 16, 1992. In our opinion, Rule 130.6(b) is in harmony with the general objectives of Articles 8308-4.25(b) and 8308-4.26(g) to allow the parties an opportunity to agree on a designated doctor before the Commission selects a designated doctor. If the provision in Rule 130.6(b), which directs the Commission to allow the parties to agree on a designated doctor, were construed to be directory and not mandatory then, in our opinion,

the rule would not be in harmony with the statutory provisions it implements in that the statutory provisions specifically require the Commission to direct the employee to be examined by a mutually agreed upon designated doctor, and to select the designated doctor if the parties are unable to agree on a designated doctor. It seems reasonable to conclude that one of the main objects of allowing the parties an opportunity to mutually agree on the selection of a designated doctor is to lessen the likelihood of a dispute over the designated doctor's findings. It has been stated that the purpose of the workers' compensation law is to provide for a speedy, equitable relief for the benefit of an employee injured in the course of his employment. Seal v. American Motorist Insurance Company, 798 S.W.2d 382 (Tex. App. - Beaumont 1990, writ denied). If further dispute can be curtailed by mutual agreement of a designated doctor, that purpose is served.

We hold that the hearing officer was correct in determining that Dr. F was not a designated doctor because, as concluded by the hearing officer, Dr. F was not appointed pursuant to the provisions of Rule 130.6. The hearing officer's conclusion concerning Rule 130.6 is supported by that portion of Finding of Fact No. 9 which finds that the Commission did not notify the claimant that a designated doctor would be directed to examine him to resolve said dispute before scheduling the June 11, 1992 appointment with Dr. F. In sum, the claimant and the carrier were not given 10 days to agree on a designated doctor after notification that a designated doctor would be directed to examine the claimant. The Commission simply selected Dr. F on the day the notification letter was written. Noncompliance with Rule 130.6 was clearly put into issue by the testimony of the claimant and his wife, and by the documentary evidence. We have previously affirmed a hearing officer's determination that a doctor was not a designated doctor because the provisions of Rule 130.6 were not followed. *See* Texas Workers' Compensation Commission Appeal No. 92608, decided December 30, 1992, which involved failure to comply with those provisions of Rule 130.6 concerning notice that a designated doctor would be directed to examine the employee, informing an unrepresented employee that an Ombudsman is available to explain the contents of an agreement for a designated doctor, and sending confirmation letters to the employee.

Having determined that the hearing officer was correct in concluding that Dr. F was not a designated doctor under Articles 8308-4.25 or 8308-4.26 because of the Commission's failure to comply with Rule 130.6, we need not determine whether, as found by the hearing officer, Dr. F was requested by the Commission to examine the claimant under the provisions of Article 8308-4.16, for in either event, Dr. F's findings on MMI and impairment rating were not entitled to presumptive weight. Presumptive weight attaches only to designated doctors' findings of MMI and impairment rating under Articles 8308-4.25 and 8308-4.26. We observe, however, that a required medical examination under Article 8308-4.16 can be for the purposes of resolving questions about the impairment caused by the compensable injury and the attainment of MMI. However, we also observe that Article 8308-4.16 does not provide for presumptive weight to be given to the report of a doctor selected under the authority of that article. Appeal No. 92233,

supra. *See also* Rule 126.6(f).

The hearing officer did not find nor conclude that Dr. D was or was not a designated doctor. The hearing officer found only that the Commission told the claimant that it would appoint a doctor to resolve "the dispute," and that on July 9, 1992 the Commission entered a medical examination order at the Commission's request directing the claimant to be examined by Dr. D for the purpose of assessing a total body impairment. It was not necessary for the hearing officer to decide the status of Dr. D in order to resolve the issue before him (whether the claimant reached MMI on June 11, 1992 based on the report of Dr. F) and we do not find it necessary for purposes of this appeal to determine the status of Dr. D. The hearing officer, and not the Appeals Panel, is the finder of fact.

After concluding that Dr. F was not a designated doctor, the hearing officer concluded that the claimant did not reach MMI on June 11, 1992. The question before us is whether that conclusion, and Finding of Fact No. 18 which supports the conclusion, are supported by sufficient evidence and are not so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865 (Tex. App.-Texarkana 1989, no writ). The evidence shows that Dr. A certified that the claimant had reached MMI on April 7, 1992, but in a later report stated that he anticipated that the claimant would not reach MMI until January 1993. Dr. A's opinion on MMI is equivocal at best. We have held, however, that even a designated doctor may, under appropriate circumstances, amend or correct his report on MMI or impairment rating. *See* Texas Workers' Compensation Commission Appeal No. 93062, decided March 1, 1993. There is no TWCC-69 from Dr. F. He simply stated in his letter of June 11, 1992 that the claimant had probably reached MMI; however, in making that determination he did not have the claimant's operative note for the September 1991 surgery. We have cautioned before about the risk of bare statements concerning the attainment of MMI where the doctor does not use a Commission prescribed form TWCC-69 and does not cover the criteria for finding MMI. *See* Texas Workers' Compensation Commission Appeal No. 91083, decided January 6, 1992. Finally, Dr. D reported in a TWCC-69 and in a narrative report dated July 22, 1992 that the claimant had not attained MMI. Dr. D reviewed the claimant's 1991 surgery records in making his determination. Considering that the hearing officer did not make a finding or conclusion as to whether or not Dr. D was a designated doctor, there is no indication that he gave presumptive weight to Dr. D's report. In our opinion, the evidence is sufficient to support the hearing officer's conclusion that the claimant did not reach MMI on June 11, 1992 without giving presumptive weight to Dr. D's report, and that conclusion is not against the great weight and preponderance of the evidence. Hence, a finding concerning the status of Dr. D was not necessary for the resolution of the issue before the hearing officer and is not necessary for purposes of this appeal.

Lastly, the carrier requests that we review "that [the hearing officer] ordered [the

carrier] to pay temporary income benefits (TIBS) since claimant had not reached MMI." In his order the hearing officer stated that "[b]ecause claimant has not reached MMI and there is no indication his disability has ended, he is entitled to have TIBS continued from the day they stopped. Accrued TIBS are to be paid with interest in a lump sum. TIBS continue until disability ends or MMI is reached." While the hearing officer is correct in his statement of the law regarding entitlement to TIBS, we observe that there was no issue concerning disability at the hearing and the parties did not direct their evidence to such an issue, rather the focus was on the status of doctors and MMI. A claimant's eligibility for TIBS may be affected upon a finding of no disability even if MMI has not been reached. Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991. Accordingly, we modify the hearing officer's order to reflect that the carrier is ordered to pay TIBS to the claimant so long as the claimant has disability and has not reached MMI.

The decision of the hearing officer, as modified to reflect that the carrier shall pay TIBS to the claimant so long as the claimant has disability and has not reached MMI, is affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Thomas A. Knapp
Appeals Judge